



Security Council

Distr.: General
8 May 2015

Original: English

Letter dated 5 May 2015 from the Permanent Representative of Burundi to the United Nations addressed to the President of the Security Council

I have the honour to submit to you the decision of the Constitutional Court on the compliance with the Burundian Constitution, adopted by referendum in 2005, of the candidacy of President Pierre Nkurunziza in the 2015 presidential election, adopted this 5 May 2015 (see annex).

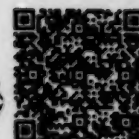
I request that the present letter and its annex be circulated as a document of the Security Council.

(Signed) Albert Shingiro
Ambassador
Permanent Representative

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Annex to the letter dated 5 May 2015 from the Permanent Representative of Burundi to the United Nations addressed to the President of the Security Council

[Original: French]

The Constitutional Court of Burundi, sitting in Bujumbura to consider a matter concerning interpretation of the Constitution, has issued the following ruling:

Considering the letter of 17 April 2015 from 14 Senators addressed to the President of the Constitutional Court and received by the Registry of the Court on 28 April 2015, whereby application was made to this Court seeking interpretation of articles 96 and 302 of the Constitution of 18 March 2005;

Considering that the application was filed with the Court Registry on 28 April 2015 under No. RCCB 303;

Considering the report by a member of the Court;

Considering the analysis of the application by the Court at its session of 30 April 2015;

1. On the appropriateness of the application

Whereas the application was made by 14 Senators seeking the interpretation of articles 96 and 302 of the Constitution;

Whereas the procedure for making an application for interpretation of the Constitution is set out in article 228, third point, of Act No. 1/010 of 18 March 2005 promulgating the Constitution of the Republic of Burundi;

Whereas the third point of that article provides that the Constitutional Court shall interpret the Constitution at the request of the President of the Republic, the President of the National Assembly, the President of the Senate, one quarter of the members of Parliament or one quarter of the senators;

Whereas this Court has received an application from 14 out of a total of 41 senators;

Whereas one quarter of the senators is calculated to be 11 senators;

And therefore the number of senators who have made application to the Court meets the requirement of article 228, third point, of Act No. 1/010 of 18 March 2005;

Whereas the question of application to the Constitutional Court is also addressed in articles 4 and 5 of Act No. 1/03 of 11 January 2007 amending certain provisions of Act No. 1/018 of 19 December 2002 on the organization and functioning of the Constitutional Court and the applicable procedure;

Whereas, pursuant to article 5 of Act No. 1/03 of 11 January 2007 amending certain provisions of Act No. 1/018 of 19 December 2002 on the organization and functioning of the Constitutional Court and the applicable procedure, the Applicants duly sent notice of their application to the authorities mentioned in article 4 of the Act;

Whereas they also made application to the Court by joint letter under article 6 of the aforementioned Act;

Whereas on the basis of the foregoing the Court finds that it has been appropriately seized;

2. On the competence of the Court

Whereas the question submitted to the Court by the Applicants is one of interpretation of the Constitution;

Whereas the Constitution states, in article 228, third point, that the Constitutional Court has the competence to interpret the Constitution;

Whereas the Constitutional Court therefore has the competence to examine the application before it;

3. On the admissibility of the application

Whereas article 230 (1) of the Constitution provides that the Constitutional Court may be seized by one quarter of the members of the Senate;

Whereas the Applicants are indeed members of the Senate who have requested the Court to interpret provisions of the Constitution pursuant to article 228 thereof;

And therefore the application is admissible;

4. On the interpretation of articles 96 and 302 of the Constitution

Whereas the Applicants are requesting the interpretation of articles 96 and 302 of the Constitution;

Whereas article 96 reads as follows: "The President of the Republic shall be elected by direct universal suffrage for a term of five years, renewable once";

Whereas article 302 reads as follows: "Exceptionally, the first President of the post-transition period shall be elected by the National Assembly and the Senate meeting in joint session, by a two-thirds majority of the members. If such majority is not obtained in the first two rounds, additional rounds shall immediately follow until a candidate obtains the votes of two thirds of the members of Parliament.

In the event that the first President of the Republic of the post-transition period leaves the office vacant, his or her successor shall be elected under the same procedure specified in the preceding paragraph.

The President elected for the first post-transition period may not dissolve Parliament."

In order to analyse the provisions whose interpretation has been requested, it is necessary first to refer to the context and the period in which they were drafted;

Although the wording of article 96 does not pose any problem of interpretation, the same cannot be said of article 302. The word "exceptionally" creates some doubt as to the drafter's actual intention;

In order to understand the spirit of the Constitution, it is wise first to consult the text that was the main inspiration for the drafter in 2005;

The drafter's aims can be sought in the texts that inspired the Burundian drafter, the first and foremost of which was the Arusha Peace and Reconciliation Agreement, the true, obligatory and necessary source of inspiration for that drafter;

Whereas the Arusha Agreement was nevertheless not the sole inspiration for the Burundian drafter in 2005;

And other texts, notably the national unity charter adopted by referendum in February 1991, inspired the Burundian drafter without thereby becoming supra-constitutional;

In addition to which it should be recalled that the Arusha Peace and Reconciliation Agreement had to be converted into legislation in order to become part of the domestic legal system through a vote of Parliament on Act No. 1/017 of 1 December 2000 on the adoption of the Arusha Peace and Reconciliation Agreement;

Whereas, therefore, the interpretation of the provisions in question requires an examination of what the legislator had in mind when drafting the Constitution in 2005;

Whereas the Arusha Peace and Reconciliation Agreement, in particular the section on constitutional principles, while not supra-constitutional, is nevertheless the cornerstone of the Constitution;

And anyone who would violate the main constitutional principles of the Agreement cannot claim to respect the Constitution;

And as even the question of the exercise of presidential power is clearly explained in Protocol II;

Whereas the negotiators did wish to prevent any President from holding more than two terms, as is stated in chapter I, article 7, of Protocol II to the Arusha Peace and Reconciliation Agreement, concerning the constitutional principles for the Constitution of the post-transition period;

Whereas, according to the Arusha Peace and Reconciliation Agreement:

"1. (a) The Constitution shall provide that, save for the very first election of a President, the President of the Republic shall be elected by direct universal suffrage ...

(b) ...

(c) For the first election, which shall be held during the transition period, the President shall be elected indirectly as described below, in article 20 (1).

...

3. She/he shall be elected for a term of five years, renewable only once. No one may hold more than two presidential terms ...".

Whereas a reading of this article clearly shows that the negotiators of the Arusha Agreement did indeed want to limit the number of terms to two, and merely wanted to apply a different election procedure because, as is explained in the "explanatory notes to Protocol II", the situation was not yet calm among the Burundian people;

Whereas, on the matter specifically of article 7 (1) of chapter I on the constitutional principles for the Constitution of the post-transition period, the Bureau of the Committee notes that no agreement was obtained on the mode of election of the President, as the system of politically alternating presidents was considered unworkable, democratically unsustainable or even a source of instability;

Whereas the proposals put forward were mutually exclusive, as the parties on one side proposed to have the President of the Republic elected by the National Assembly and the Senate, and this proposal was challenged by the proponents of election by direct universal suffrage, which would give the President so elected a strong mandate from the people and broad legitimacy;

And given this situation, the Bureau of the Committee fashioned a compromise according to which, given the current political context in Burundi and the need to gradually normalize political life, it was crucial to avoid holding new elections at the end of the transition so as to garner broad support for the first President, whose main priority would be to stabilize the political institutions;

Whereas it should be noted, nevertheless, that the drafter in 2005 misapplied the recommendation from the Arusha Agreement;

Whereas, instead of creating an exception to the election procedure in article 96 as the Agreement had intended, article 302 of the Constitution, owing to its placement in the Constitution under the heading "Special provisions for the post-transition" and the ambiguity of the word "exceptionally", is independent of article 96 of the Constitution and establishes a completely exceptional and special term separate from that established by article 96;

Whereas the application of article 302 postpones the application of the limit on the number of presidential terms under direct universal suffrage provided for in article 96;

And this idea is confirmed, moreover, by article 190 of the Electoral Code of April 2005, adopted just one month after the Constitution was promulgated, which article is the equivalent of article 302 of the Constitution and indicates that this is an exception to the principle set out in article 186 of the Electoral Code of 2005, which is in turn the equivalent of article 96 of the Constitution;

And therefore, while the Arusha Peace and Reconciliation Agreement recommended that no President should hold more than two terms, the lack of clarity in article 302 of the Constitution has made a third term possible for a President who governed during the initial post-transition period;

Whereas in their application the Applicants requested this Court to interpret articles 96 and 302 of the Constitution and to state whether one renewal of the current presidential term would comply with the Constitution;

Whereas, according to the analysis above, article 96 means that no more than two terms may be held under direct universal suffrage;

Whereas article 302 established a special term under indirect universal suffrage that has nothing to do with the terms provided for by article 96;

Whereas, as was stated above, the Arusha Peace and Reconciliation Agreement is the cornerstone of the Constitution, institutional governance in a republic is nevertheless always based on a Constitution;

And although the letter and spirit of the Arusha Peace and Reconciliation Agreement — according to which no President may hold more than two terms — must be respected, the President who was elected pursuant to article 302 of the current Constitution may, without violating the Constitution, renew once only the term to which he was elected by direct universal suffrage;

For these reasons:

The Court,

Considering the Constitution of the Republic of Burundi, and in particular articles 96, 228, 230 and 302 thereof;

Considering Act No. 1/03 of 11 January 2007 amending certain provisions of Act No. 1/018 of 19 December 2002 on the organization and functioning of the Constitutional Court and the applicable procedure, and in particular articles 4 (1), 5 and 6 thereof;

Ruling on the application of 14 Senators and after due legal consideration;

1. Finds that the Court was appropriately seized;
2. Finds that it has the competence to rule on the application for interpretation of articles 96 and 302 of the Constitution;
3. Finds the application admissible;
4. States that article 96 means that the number of terms under direct universal suffrage is limited to two and that article 302 establishes a special term under indirect universal suffrage that has nothing to do with the terms provided for by article 96;
5. Establishes as law that the renewal of the current presidential term for five years one last time by direct universal suffrage is not contrary to the Constitution of the Republic of Burundi of 18 March 2005.

So decided and issued at Bujumbura on 4 May 2015, by Charles Ndagijimana, President of the Court, Sylvere Nimpagaritse, Vice-President, Salvator Ntibazonkiza, Benoît Simbarakiye, Pascal Niyongabo, Aimée-Laurentine Kanyana and Claudine Karenzo, Members, assisted by Béatrice Nahimana, Registrar.

Charles Ndagijimana
President of the Court

Sylvere Nimpagaritse
Vice-President

Béatrice Nahimana
Registrar

Members
Salvator Ntibazonkiza
Benoît Simbarakiye
Pascal Niyongabo
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